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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 753

THOMAS T. COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 366 F. 2d 363.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1966. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 7, 1966, and the petition was filed on November 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 48(b), Fed. R. Crim. P., is set out on page 5 of the petition.

242-508—67——1

QUESTION PRESENTED

Whether petitioner could properly be reindicted after the trial court had dismissed the first indictment because of delay in arraignment.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of 10 counts of mail fraud and of one count of using a fictitious name to effect a mail fraud, in violation of 18 U.S.C. 1341 and 1342. He was sentenced to concurrent terms of imprisonment for two years on all counts, with a recommendation that he be considered for parole in a period not to exceed one year (R. 1–15, 184).[1] The court of appeals affirmed.

1. The indictment alleged, and the evidence disclosed, a scheme to defraud, extending from May through August 1961, by pretending to conduct a lottery for the distribution of free lots. Participants in the lottery, who obtained numbers at supermarkets in Phoenix, Arizona, were told that winners would be chosen by a drawing and asked to pay only closing costs to obtain title to the lots they won (Tr. 170, 176, 183–184). In fact, there were no drawings in the lottery; every participating customer was treated as a winner (Tr. 200, 579, 593). Agents were employed by petitioner to communicate with the "win-

[1] "R." refers to the record of proceedings in the district court, "Tr." to the trial transcript and "Supp. Tr." to the supplemental transcript of the pre-trial hearing.

ners" and induce them to pay the closing costs by false representations as to the location and development of the lots (Tr. 317, 324, 370, 381, 384, 396, 498, 523, 536). The land in question was in fact an undried mud flat formerly under Great Salt Lake and saturated with salt (Tr. 797–799). Petitioner used the fictitious name of "Al Sherman" in carrying out the plan (Tr. 915, 916, 953–967, 852, 892).

Defense evidence sought to establish that petitioner was not the person who conceived the plan and that he did not know that the plan was not bona fide (Tr. 810–1048). Contrary to the implication in the petition (Pet. 12), petitioner did take the stand. However, he confined his testimony to asserting that he had written to the postal authorities outlining the plan and that he thought he had their approval (Tr. 1043–1044), a claim contested by the government (Tr. 1048–1051).

2. The original indictment was returned on February 27, 1963 (R. 1–15). A warrant for petitioner's arrest was mailed to the United States marshal for the Southern District of Florida (Supp. Tr. 35) where petitioner was in jail awaiting trial for violation of 18 U.S.C. 1010 (false statements to Federal Housing Administration).[2] The marshal did not serve the Arizona warrant until November 8, 1963, when the Florida indictment was dismissed (Supp. Tr. 16). Petitioner, in an affidavit, stated that this

[2] Two earlier indictments charging concealment of assets in violation of the bankruptcy law, 18 U.S.C. 152, had been dismissed on February 19, 1963 (Supp. Tr. 33).

was the first he knew of these charges (Supp. Tr. 31).

A motion to dismiss the original indictment was filed in January 1964 and heard in July. The judge was sharply critical of the government's failure to serve the warrant sooner (Supp. Tr. 35–39). On learning that the statute of limitations had not run and that the grand jury would soon meet, the judge suggested that petitioner be reindicted and the original charges be dismissed (Supp. Tr. 36–41). Government counsel stated that, if the indictment were dismissed, the government would reindict (Supp. Tr. 51–57). The court then dismissed the indictment "upon the ground of unreasonable delay in bringing the defendant to trial." Bail was continued for sixty days, subject to transfer to any subsequently returned indictment. Pursuant to the request of petitioner's counsel, it was further ordered that if there should be no reindictment within such period the clerk should enter an order exonerating the bond (Supp. Tr. 63; R. 72–73).

On September 9, 1964, the grand jury returned a second indictment, identical to the first. On December 14, 1964, petitioner's motion to dismiss this indictment with prejudice was denied. The court ruled that the dismissal of the original indictment because of the government's failure to prosecute did not bar a new indictment and that petitioner had shown no prejudice from the delay (R. 92, 103–105).

ARGUMENT

1. As both courts below found, the record makes it entirely clear that the judge who dismissed the first indictment did not intend to bar reindictment; rather he dismissed the case for lack of prosecution caused by the delay in serving the warrant. The colloquy which preceded the order of dismissal dealt extensively with the possibility of reindictment, and it was only after the government indicated its intention to reindict that the first indictment was ordered dismissed. Moreover, while dismissing the indictment, the court ordered petitioner continued on bail; obviously no bail would have been necessary if the trial judge had thought that his order barred further prosecution. See *Petition of Provoo,* 17 F.R.D. 183 (D. Md), affirmed *per curiam,* 350 U.S. 857. Although the judge spoke of the delay which he found here as involving the constitutional right to a speedy trial, there is, on the present record, no substantial doubt as to his intention to dismiss solely for lack of prosecution. A dismissal on this basis is without prejudice to reindictment and retrial. *Mann* v. *United States,* 304 F. 2d 394 (C.A.D.C.). There was thus no reason to dismiss the present indictment on the basis of the order of dismissal as to the first indictment.

2. Nor was there any other reason to dismiss the present indictment, which was returned within the applicable period of limitations. Petitioner lays stress upon the entire period of forty-two months which elapsed between the commission of his offense,

which is alleged to have ended on August 31, 1961, and the beginning of his trial on March 9, 1965. However the first eighteen months of that period, until February 27, 1963, when the first indictment was returned, was a period of investigation—a not unreasonable time in relation to a scheme which included activities in four States.[3] And the delay between November 1963 (when petitioner learned of the first indictment) and September 9, 1964 (the date of the second indictment) was the result of petitioner's motion to dismiss the first indictment. The delay caused by defense motions, however legitimate, may not properly be charged against the government. *United States* v. *Lustman,* 258 F. 2d 475, 477 (C.A. 2), certiorari denied, 358 U.S. 880.

The only period of unnecessary delay was the span of eight months between February 27 and November 8, 1963, when the arrest warrant was served—the sole basis for the trial court's dismissal of the first indictment. This delay (apparently caused by the marshal's assumption that the arrest warrant was in the nature of a detainer) was unfortunate, but its effects were not so detrimental as to warrant granting petitioner immunity from prosecution.

This eight-month delay did not "impair the ability of [the] accused to defend himself." *United States* v. *Ewell,* 383 U.S. 116, 120. The nature of the scheme and of petitioner's defense—essentially one of good

[3] Ordinarily, the right to speedy trial has reference to the lapse of time after prosecution is commenced. See cases collected in *Nickens* v. *United States,* 323 F. 2d 808 (C.A.D.C.), certiorari denied, 379 U.S. 905.

faith—was such that it was not petitioner, but the government, which stood to suffer most from the passage of time. See Hadley, *The Reform of Criminal Procedure,* 10 Proceedings of the Academy of Political Science 396, 400 (1923). The facts which petitioner cites as indicative of prejudice (Pet. 11–12) bear this out. Thus, petitioner points to the dim recollection of government witnesses and to the death of one complainant. The former obviously worked to the detriment of the government, which had the burden of proving guilt beyond a reasonable doubt, and the letter necessitated the dismissal of one count of the indictment. Moreover, petitioner mentions "no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared." *United States* v. *Ewell, supra,* at 122. This is in sharp contrast with the extensive showing of prejudice in *Petition of Provoo,* 17 F.R.D. 183, 195, 203 (D. Md.), affirmed *per curiam,* 350 U.S. 857, and the detailed proffer of proof claimed to have been lost by reason of delay in *United States* v. *Parrott,* 248 F. Supp. 196, 207–211 (D.C.D.C.).

Any injustice which might have been involved in petitioner's incarceration in Florida prior to the dismissal of the charges then pending was appropriately redressed by the dismissal of the first indictment. Moreover, it would appear that the trial court took this period of incarceration into account in fixing the sentence in this case.[4]

[4] Petitioner could have received a maximum sentence of five years plus a fine of $1,000 on each of the eleven counts.

In the circumstances of this case, it was proper for the courts below to conclude that the indictment should not have been dismissed. See *Pollard* v. *United States*, 352 U.S. 354; *Hedgepeth* v. *United States*, 364 F. 2d 684 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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